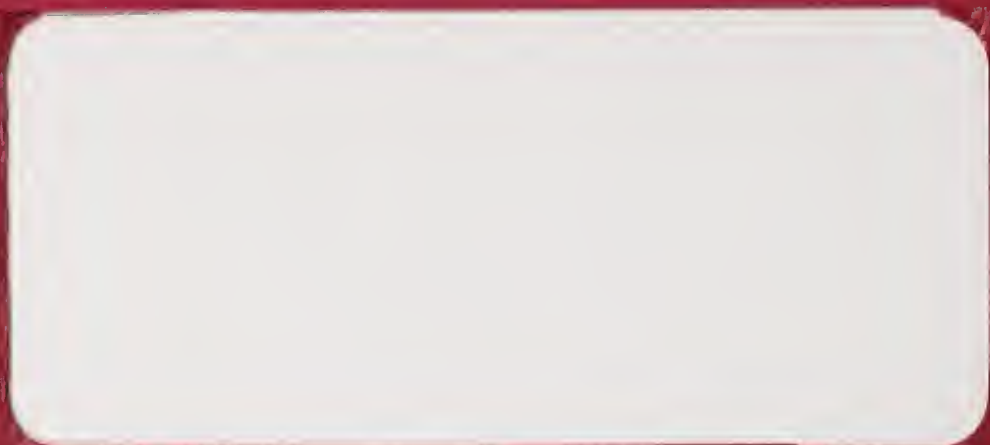


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COMMON MARKET LAW

PROF. W.C. GRAHAM

Volume 1



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COMMON MARKET LAW

PROF. W.C. GRAHAM

Volume 1

1983 - 1984

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FOREWORD

Commencing an article in Foreign Affairs, Vol.41, 1962, Maurice Schumann related the following incident:

"On August 2, 1914, a young officer burst into the office of General Lyautey in Rabat to inform him that hostilities had just broken out between France and Germany. Lyautey, who had spent the greater part of his career in Asia and in Africa and had acquired the habit of looking at problems not on the scale of a general staff map but on the scale of a world map, stopped to think, then lifted his eyes and said slowly: "They are crazy; it is a civil war." The young officer closed the door behind him without understanding. For him, as for most men of his time, the history of the twentieth century, like that of the nineteenth, could only be written by the European peoples; their strife, however tragic the consequences, was thus in the nature of things."

The European Economic Community is an institutionalised recognition of the fact that the constant hostility between warring factions within Europe which has marked its historical evolution since the time of Charlemagne is no longer tolerable in a world of larger power blocks. Europe must form a single economic unit if it is to preserve its already diminished influence in world affairs.

The Community's framers, Schumann, Monnet and others, conceived it in this light; many of its opponents thought that its threat to the sovereign and national rights of its individual component parts was more likely to weaken than strengthen the whole. Ironically enough, it probably owes its existence to the decisiveness of one considered the strongest proponent of state sovereignty - Charles de Gaulle.<sup>(i)</sup>

(i) See Alain Peyrefitte, Le Mal Français, pp. 53 and ff.

Jean Monnet, in his recently published biography, adopted as the leitmotif for the Treaty of Rome: "Nous ne coalisons pas des états, nous unissons des hommes".<sup>(2)</sup>

A successful process of economic integration requires just that degree of political integration necessary to implement community-wide economic measures, without threatening critical vested legal and political interests of a local nature. The choice of different political mechanisms which vary from directly applicable community legislative enactments to the implementing of community measures through local legislative action represents a trade-off between the efficient achievement of community goals in the first case and the greater recognition of local diversity, with resulting loss of homogeneity, in the second.

The extent to which the desired economic integration may be achieved, while at the same time preserving, within the community framework, the wide variety of linguistic, cultural and legal diversities which are the result of the European experience, to some extent depends on finding the appropriate political and legal mechanisms, even when the political will for community action is present.

The student of the Canadian constitutional process will here find himself on familiar terrain marked by the antithesis between centrifugal political pressures and centripetal economic considerations. Those who assisted in the recent referendum debate in the Province of Quebec will readily identify the struggle between the notions of political Sovereignty and economic Association that lay at the base of the thesis of the Parti Québécois. One cannot help but wonder whether the European experience does not show that complete political sovereignty is impossible within the framework of a highly developed economic union.

(2) See Jean Monnet, *Mémoires*, Fayard 1978

Quite apart from the issues raised in the referendum debate, still of concern to Canadians, the organization of the Common Market display many other characteristics that are of direct relevance to an understanding of the present Canadian constitutional debate. It is hoped that an examination of the issues of the freedom of movement of persons and capital, the harmonization of diverse legislation and other issues crucial to the evolving interdependence of the members of the EEC will throw a useful light on similar problems when considered in the Canadian context, particularly those related to the preserving and strengthening of the "Canadian economic union".

It is hoped that the student will derive certain benefits from a study of these course materials which directly relate to his studies in Canadian law. This in several ways. First, by examining just how far European unity has been achieved on the legal plane, both legislative and judicial, he will acquire some knowledge of the legal structure of the European Economic Communities and be able to determine to what extent one can speak of "European law" as embodying notions distinct from those prevailing in each of the member states.

This knowledge is of direct relevance for those whose practice brings them into contact with European problems. In our increasingly interdependent world it represents an important part of that growing body of studies which relate to "trans-national legal problems".

An examination of how jurists with a predominantly civil law tradition and a different view of the regulatory process grapple with certain concepts which are common to the Canadian legal experience should give a better understanding of the way in which they are dealt with in our system (this is particularly true in the area of anti-trust law, where European,

American and Canadian developments may profitably be compared).

There are also elements present in the evolving EEC law which deal with the relationship between local law and European precepts which, from a comparative point of view, are substantially similar to questions which arise in Canadian constitutional law. Thus we regard with interest how the European judiciary are now grappling with problems which to us are all too familiar. Such as:

- (1) What is the matter ("pith & substance") of the legislation (E.C. Commission v. Ireland);
- (2) Paramountcy and the occupied field (Ministry of Fisheries v. Schonenberg);
- (3) Hierarchy of norms, paramountcy (Costa);
- (4) Relationship to international law (Fromagerie Suisse);
- (5) Constitutional restrictions and treaty-making powers (Handelsgesellschaft).

As well, a consideration of the measures taken to permit freedom of movement of persons and capital and to harmonize certain areas of European company law provides a useful background knowledge, albeit necessarily summary, to developments in this area.

Finally, as suggested above, the European experience serves as a useful model from which we can gain greater insight into the resolution of those constitutional law problems which presently are of concern to all Canadian citizens.